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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 17.

JAMES LANIER BELL,
Petitioner,

v.

PREFERRED LIFE ASSURANCE SOCIETY OF MONTGOMERY,
ALABAMA, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of
Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINIONS IN COURTS BELOW.

The District Court rendered an opinion which is not officially reported but is copied on pages 165 to 168, inclusive, of the printed record. The opinion of the Circuit Court of Appeals appears on pages 173 to 176, inclusive, of the printed record and is reported in 131 F. (2d) 516 et seq.

JURISDICTION OF THIS COURT.

Jurisdiction of the Supreme Court is based upon Section 240 (a) of the Judicial Code, 28 U. S. C., Sec. 347. This Court on April 19, 1943, granted the writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit (R. 176, 177).

STATEMENT OF THE CASE.

Introduction.

For convenience, we shall refer to the parties according to their positions in the District Court, to the petitioner as plaintiff and to the respondents as defendants.

As an appendix to this brief there are printed all of the statutes of the State of Alabama having any bearing upon this litigation. The Act approved August 1, 1927 (App. p. 63), and appearing in General Acts of Alabama 1927, page 219, was in force when the defendant Society was incorporated in 1928 (R. 140), and began business in 1929 (R. 10, 70), but was superseded in 1931 by the statute which is now Code 1940, Title 28, Sec. 3 (App. p. 64). The plaintiff became a member of the defendant Society in 1934 (R. 137). All of the other statutes are still in force and are all sections of the same Title 28 of the 1940 Code of Alabama.

Entire Record Should Be Considered.

The plaintiff asked for a temporary receiver to be appointed "to immediately take charge of the insurance department of the Society" (R. 7, 8, 145, 146). The defendant Society did not file a motion to dismiss [Rule 12 (b) Rules of Civil Procedure], but instead assigned as its first two defenses (R. 38):

"First Defense.

"The complaint fails to state a claim against this defendant upon which relief can be granted.

- 3 -

"Second Defense.

"The Court lacks jurisdiction because the amount actually in controversy is less than \$3,000.00 exclusive of interest and costs."

The defendant Society also promptly filed its verified complete answer to the complaint (R. 38 to 69, 2, 148 to 164, 143). More than 200 separate interrogatories were filed by the plaintiff (R. 9 to 38) and the defendant answered those interrogatories under oath three days after they were propounded (R. 9 and 70 to 133).

The parties all joined in submitting the case to the District Court upon oral arguments and briefs. As stated by the District Court (R. 165):

"The defendant Society contends that the Court lacks jurisdiction because the amount actually in controversy is less than \$3,000.00 exclusive of interest and costs, and also that the complaint fails to state a claim upon which relief can be granted. Upon oral arguments and briefs, the case is submitted to the Court for decision upon the primary question of whether the Court has jurisdiction to grant the relief prayed by the plaintiff."

In effect, then, we may say that "during a hearing or trial," and hence not in writing [Rule 7(h), Rules of Civil Procedure], a motion was made for summary judgment under Rule 56, Rules of Civil Procedure.

The District Court considered the entire record, including facts not stated in the complaint, such as "that at present he (plaintiff) has paid a total in dues of only \$202.35" (R. 165, 149, 41).

The plaintiff designated that the interrogatories and answers thereto should be included in the record on appeal to the Circuit Court of Appeals (R. 1 and 2), and hence should properly be considered by that Court. In his brief in the Circuit Court of Appeals (page 4) the

plaintiff stated the question presented by that appeal in a manner to which the defendants agreed (Their brief page 2):

“The question presented by this appeal, then, is whether the complaint, **as supplemented by the entire record**, states any claim upon which relief can be granted and wherein the amount in controversy exceeds three thousand (\$3,000) dollars, exclusive of interest and costs.” (Emphasis ours.)

The plaintiff, in his brief in the Circuit Court of Appeals, based his argument upon the entire record and prefaced that argument with the following introduction:

“There is some disagreement among the Courts and commentators as to whether on a motion to dismiss under Rule 12 of the Federal Rules the Court is limited, as on demurrer, to a consideration of the pleading under attack, or whether the Court can look to the entire record, as on a motion for summary judgment under Rule 56. The plaintiff will not attempt to resolve this conflict, but, confident that he will prevail, regardless of which rule be adopted, will demonstrate **from the entire record** that at the very least he is entitled to present his proofs, and will urge upon this Court that so many of his allegations of wrongdoing have been admitted, and so many others not denied or answered evasively, that he has made out a prima facie case for the immediate appointment of a receiver.” (Emphasis ours.)

The Circuit Court of Appeals commented in effect that the decision of the District Court was based upon the entire record (R. 174):

“Depositions of certain of the officers were taken, and, the district judge of the opinion on the pleadings and the facts established by them and by the depositions, that since under plaintiff's certificate, he could never have been, or be, entitled to a sum greater

than \$1,000.00, his claims for damages were merely colorable, and that the suit was an individual suit and not a class suit under Rule 23, dismissed the cause for want of jurisdiction."

In this Court the plaintiff relied upon the answers to interrogatories in support of the petition for certiorari (Typewritten pages 4, 6, 7, 12) and also in its brief upon the merits (Petitioner's typewritten brief page 19).

It must, therefore, be conceded that the entire Record should be considered by this Court.

Lack of Finality of the Judgment as to Plaintiff's Substantial Rights.

The District Court found "that the complaint fails to state a claim upon which relief, within the jurisdiction of the Court, can be granted" and, therefore, dismissed the plaintiff's complaint **without prejudice** (R. 168).

The Circuit Court of Appeals emphasized that none of the plaintiff's rights were finally adjudged (R. 175, 176):

"The dismissal was, of course, without prejudice to the right of plaintiff to try again in the State Court or the Federal Court, as he may be advised, and whether if he tries again he might make a case under Rule 23, is not before us for decision. What the district judge decided and what we decide is only that, as brought, as an individual suit by plaintiff on his own behalf, the amount in controversy was not within the jurisdiction of the Court."

The Parties.

The petitioner here was the sole party plaintiff. He filed his original complaint on February 3, 1941 (R. 2, 9, 38), his amended complaint on March 4, 1941 (R. 133). On May 6, 1941 (R. 165), the District Court dismissed the

plaintiff's complaint without prejudice. The action had then been pending in the District Court for a little more than three months and still there was only one party plaintiff.

The plaintiff now claims that this is a class action. The complaint (R. 133) did not allege that the plaintiff represented anyone other than himself, nor that the complaint was filed on behalf of the other members of the defendant Society, nor on behalf of the Society itself. The complaint did not invite any other members of the Society to join, and, as stated, over a period of three months no one did join with the plaintiff.

Certainly \$200,000.00 of the relief prayed was for plaintiff's individual benefit solely (R. 146). True it was alleged that the appointment of a receiver as prayed would benefit both plaintiff and other members of the Society (R. 145), and that the money judgment against the defendant officers, directors and trustees would be for the benefit of the defendant Society and its members (R. 146, 146). However, plaintiff claimed that he himself was entitled to relief as well as to the \$200,000.00 damages and asked for judgment for all relief for himself (R. 145, 146).

The plaintiff was one out of 10,241 members (R. 138). He had paid in premiums or dues a total of \$202.35 (R. 151) as compared with total assets of the defendant Society of \$1,283,355.64 (R. 141, 156, 109). His insurance certificate when matured would be of the face value of \$1,000.00 as compared with total insurance in force in defendant Society of \$12,143,100.00 (R. 118). Several hundred thousand dollars of that insurance was upon different plans, ordinary life, twenty-pay life, endowment at 85, yearly renewable term insurance, and other miscellaneous plans (R. 118), in addition to the contingent endowment plan upon which plaintiff's certificate was issued.

We shall contend that the action was not a class action and could not have been a class action.

The defendants were a fraternal benefit Society organized under the laws of Alabama and its officers, directors and trustees (R. 133 to 135), most of whom were citizens of the same State. The plaintiff was a citizen of South Carolina. Jurisdiction of the District Court was sought on the ground of diversity of citizenship.

Other Record Facts.

Petitioner (plaintiff) confines his statement of the case to the charges, and allegations of the plaintiff's complaint (Petitioner's typewritten brief page 1 et seq.), and ignores the other record facts.

The defendant Society was organized August 28, 1928 (R. 140), and began business as a fraternal benefit society on February 16, 1929, with 504 members (R. 10, 70). Its membership has increased to over 10,000 (R. 138), and its assets and surplus have steadily accumulated (R. 162):

Year	Assets	Surplus
1929	\$ 2,410.25	\$ 1,268.04
1930	26,823.76	9,412.59
1931	60,160.51	16,999.84
1932	94,304.58	33,166.84
1933	171,267.16	44,411.66
1934	309,644.82	94,711.52
1935	442,985.68	147,388.92
1936	566,953.81	171,876.47
1937	705,925.79	192,417.54
1938	901,411.92	250,180.58
1939	1,062,503.28	267,896.29

A report of official examination as of December 31, 1939, of all the affairs of the defendant Society, including its fraternal workings and the relationship of its subordinate lodges, such examination having been conducted by the representatives of the States of Alabama, Mississippi and Tennessee pursuant to the requirements of the Na-

tional Association of Insurance Commissioners (R. 90), appears on pages 91 to 123 of the printed record. That report shows that a preliminary report had indicated some doubt upon the validity of the election of the trustees, but that in order to remedy that situation the Supreme Lodge of the Society was called into extraordinary session under the supervision of the Bureau of Insurance of the State of Alabama for which elections of representatives were "held in strict conformity with the constitution and by-laws" (R. 95). "This meeting was held on January 15th, 1940, at which trustees were elected in accordance with the constitution and by-laws. * * * An examination of the records of the Supreme Lodge and the local lodges indicate that the meetings and elections met fully the requirements of the Constitution and by-laws" (R. 96). The examiners found in existence and functioning twenty lodges located in five States (R. 100), and found that "the minutes and records of the subordinate lodges indicate that the by-laws were strictly complied with in the election of the representatives (to the Supreme Lodge meeting held January 15th, 1940). It is the opinion of your examiners that the Society is now meeting all reasonable requirements for a lodge society with ritualistic form of work and a representative form of government" (R. 101). The examiners further found that "an examination of numerous accepted and rejected applications were made which indicate that sound methods were used by its underwriter and medical examiners. This is also reflected in the mortality experience of the Society" (R. 119). The examiners investigated the reinsurance arrangement with the First National Life Assurance Society of Atlanta, Georgia, and found that it had resulted in a profitable business to the defendant Society (R. 119). The examiners made the following report as to the changes in personnel and compensation of the officers, changes almost the same as those professed to be desired by the plaintiff (R. 121):

"On December 2, 1939, at a meeting of the Board of Trustees, the following changes were made in the personnel and compensation of the officers:

"(a) The resignation of Mrs. M. M. Longshore as Secretary and Treasurer, was accepted, effective December 15, 1939, and her salary terminated as of December 1, 1939.

"(b) The salary of Joseph E. Justice as President was changed from \$15,000.00 per year to \$5,000.00 per year, effective December 1, 1939.

"(c) The contract with S. H. Longshore, as General Manager, was modified effective December 1, 1939, in the following particulars:

"1. The term was reduced from 25 years after March 1, 1929, to 15 years from that date, making it expire on March 1, 1944.

"2. The stipulation therein providing that the commissions accruing under the contract shall be paid in the event of his death to his heirs or assigns was eliminated, so that in such event there shall not be payable to his heirs or assigns any amount that was not due and payable to him at death.

"3. The provision specifying a commission of 7½% on all second and subsequent years dues has been amended to provide for 5% on such dues.

"As modified, the contract terminates on **March 1, 1944**, provides for a commission of 20% of all first year dues, 5% commission on subsequent years dues except from the State of Louisiana, and 2½% of second and subsequent years dues from Louisiana."

By way of general comments the examiners reported (R. 122):

"The investments of the Society have been carefully selected. With the exception of its home office building, practically all assets are of a liquid nature, and none of its bonds or mortgages are delinquent as to principal or interest. The policy reserves are based

upon an interest rate of $3\frac{1}{2}$ per cent. At the yield now being realized the income from its bonds and mortgages, without taking into consideration other investment income, produces 4 per cent of the present policy reserves.

Insurance in force, including reinsurance, at December 31, 1939, amounted to \$12,143,100.00, which represents an increase since December 31, 1936, of \$727,947.00.

"Surplus shows an increase from \$171,876.47 on December 31, 1936, to \$261,134.73 at December 31, 1939, being a net increase of \$89,258.26."

The sworn answer ~~of~~ the defendant Society disclosed the following, among other facts:

"That defendant has only paid as death and contingent endowment and other claims to members approximately 14.55 per cent of its total income is accounted for by the fact that care is exercised in the acceptance of risks and by the fact that the society has been in existence only about eleven years; that the percentage of payment of income to members will substantially increase in the future, as the membership increases in age and as all members are paid in full when they reach 70" (R. 157).

The compensation paid to the President, Manager and Secretary up to December 15, 1939, while apparently large as salaries go in this section of the country, are in line with compensation received by officers of similar organizations throughout the country, and is not unreasonable or unfair, and in no sense a fraud against the society or its membership. The only officer receiving a seemingly large compensation is the General Manager, S. H. Longshore, and his compensation is on a commission basis and is predicated on the growth of the Society resulting from his efforts. Original trustees, receiving their appointment strictly in conformity with the laws of Alabama, and with full authority, when the Society had but \$5,000.00 in assets and about 500 members, entered into a contract with

said Longshore under which his reward was measured by the skill, energy and ability with which he managed the society and promoted its growth. * * * That the ratio of expenses—54.53 per cent to the total income of the society, is less than the average ratio of expenses to income of the majority of fraternal benefit societies operating on substantially similar lines throughout the United States, and has been duly checked and passed on by the Insurance Department of Alabama. The reduction of compensation at the January 15, 1940, meeting of the Grand Lodge and other economies being practiced, is expected to reduce this ratio in the future to an appreciable extent; that the State of Alabama has an Insurance Department specifically charged and directed with the duty and responsibility of administering all laws of the State relating to insurance and fraternal benefit societies, and to this department annual and other reports are made and the affairs of the society investigated and examined; said department has been and is fully advised of every feature of the society's operations and all suggestions and requirements of the Department of Insurance always have been promptly complied with; that this society has a surplus that insures protection to all of its members in the face of any eventuality, which is in itself an answer to any intimation that the society is not being operated fairly, honestly and efficiently" (R. 157, 158).

"The contract with the said S. H. Longshore was made on behalf of the society by trustees duly constituted as such by law, and with full power as such trustees. * * * that it was not contemplated or necessary that the membership of the society should consent to or approve such contract. This defendant avers, however, that said contract was known to trustees subsequently elected by delegates to the Grand Lodge meetings, said delegates being elected by the members of the society; that it is not contemplated and is impracticable for all members of the society to consent to or approve of the details of the management

of the affairs of the society, which are by law vested in the trustees" (R. 158, 159).

"The compensation of the officers of the Society are reasonable and have been approved by the Insurance Department of the State of Alabama; that no compensation is paid to trustees and directors as such, and that the officers are paid stated salaries with the exception of the General Manager whose compensation is on a commission basis established by contract with the Society when it was in its infancy, and whose compensation for years was small and incommensurate with the time devoted and efforts made for the advancement of the Society; it avers that under the laws of its organization it is not required that the members shall be paid dividends; that under the careful and economical conduct of the affairs of this defendant it has accumulated a substantial surplus, same being as shown by the examiners from the Insurance Department of Alabama and Mississippi as of December 31, 1939, in the sum of \$261,134.73; that following said report this defendant voluntarily gave without charge to its members paid-up and extended insurance as a part of their certificates; that this was approved by the Insurance Department of the State of Alabama" (R. 159).

PETITIONER HAS MADE NO SPECIFICATIONS OF ASSIGNED ERRORS.

Rule 27 of the Supreme Court requires the petitioner's brief to contain "a specification of such of the assigned errors as are intended to be urged (See Rule 39, par. 2)." The parenthetical reference removes any doubt that the requirement applies to review on writ of certiorari.

Rule 27 further provides:

"6. When there is no assignment of errors, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified."

Rule 38, Par. 2, provides in part:

"Only the questions specifically brought forward by the petition for writ of error will be considered."

See *National Licorice Co. v. National Labor Rel. Board*, 309 U. S. 350, 357, Note 2, 84 L. ed. 799, 807, Note 2, and authority cited.

Questions Presented by Petition for Certiorari.

The questions presented by the petition for certiorari (typewritten petition, page 5) are very general, but are limited by the brief in support of each of the questions. Let us review each of the six questions presented:

"1. Whether the decision of the Court below was in conflict with that of the 7th Circuit Court of Appeals in the case of *Boesenberg v. Chicago Title & Trust Co.*, 128 F. (2d) 245, and the decisions of the 8th Circuit Court of Appeals in the cases of *Young v. Maine*, 72 F. (2d) 640, and *Greene v. Keithley*, 86 F. (2d) 238."

Under the first case cited the petitioner, plaintiff, contended that the action was a class action, and that the amount involved was the total assets of the defendant Society (Petition, pages 5 and 6). Under the latter two cases cited the petitioner, plaintiff, argued that exemplary damages may be added to actual damages to make up the federal jurisdictional amount, and that the Court had jurisdiction of the plaintiff's claim for damages to himself. In that part of the brief in support of this first question there is a reference in a part of one sentence to a claim that "The alleged insurance practice being followed is a scheme amounting to illegal lottery and constituting an illegal and unlawful scheme to defraud, is also a wagering contract in that it attempts to give a beneficial interest to petitioner in the lives of the other members of his division in whom he has no insurable interest,

and as to whom he does not belong in the class of beneficiaries of fraternal beneficial insurance policies permitted by the statutes of the States of Alabama and South Carolina" (typewritten brief in support of petition, page 8). That reference in the brief is the only way in which that question is presented by the petition for certiorari. It is not pertinent to any of the three decisions cited in Question 1 (Petition, page 5). It is clear, therefore, we submit, that the question of wagering contract vel non is not presented.

"Whether included in the petition, or separately presented, the supporting brief is not a part of the petition, at least for the purpose of stating the question on which review is sought."

General Talking Pictures Corp. v. Western Elec. Co., 304 U. S. 175, 178, 82 L. ed. 1273, 1275.

"2. Whether the Court below has decided a federal question in a way probably in conflict with applicable decisions of this Court."

The contention of the petitioner (plaintiff) as shown by its brief on this question (typewritten brief, pages 10, 11 and 12) is that the District Court should have added the exemplary damages claimed by the plaintiff to the actual damages to make up the federal jurisdictional amount of \$3,000.00.

"3. Whether the Court below has decided an important question of local law in a way probably in conflict with applicable local decisions of the Supreme Court of the State of Alabama."

The contention of the petitioner (plaintiff) as shown by its brief (typewritten brief, pages 12 and 13) is twofold.

(a) That the complaint is sufficient to warrant the appointment of a Receiver for the protection and preservation of a trust fund, and,

(b) That punitive damages are included in the relief prayed and should be added to make the jurisdictional amount required.

"4. Whether the Court below has decided an important question of Federal law which has not been, but should be, settled by this Court."

As shown on page 14 of its typewritten brief the contention of the petitioner is, that the cases cited in question numbered one should be approved by this Court.

"5. Whether in a class suit, when more than two statements are made in a complaint, and one or more of them if made independently would be sufficient to give the Court jurisdiction, the complaint is not made insufficient by the insufficiency of one statement."

As shown on pages 14 to 17 of its typewritten brief in support of the petition for certiorari, the petitioner claims that even though his claim for \$200,000.00 individual damages against the defendant Society might not be sufficient, he had a right to bring a class action on behalf of the defendant Society and its other members.

"6. Whether the Court below violated the provisions of certain Rules of Civil Procedure."

The petitioner's brief (page 17) referred to Rules 8 (c) (2), 23 (a) and 23 (b).

The foregoing are all of the questions presented by the petition for certiorari.

No Specification of Assigned Errors in Brief on Merits as Required by Supreme Court Rule 27.

Under Supreme Court Rule 27 the petitioner (plaintiff) should have selected such of the questions presented by his petition for certiorari as he intended to urge. The only remote resemblance to an assignment of error or

specification of assigned error is contained in the second paragraph of petitioner's brief on merits:

“Questions Presented.

“Whether the judgment of the Circuit Court of Appeals was correct in holding that the Court was without jurisdiction of the subject matter of this suit.”

That question was not covered by any of the questions presented by the petition for certiorari (Petition, page 5). Moreover the Circuit Court of Appeals did not hold that the Court was without jurisdiction of the **subject matter** of this suit. It held only that “as brought as an individual suit by plaintiff in his own behalf, the amount in controversy was not within the jurisdiction of the Court” (R. 166). The dismissal was without prejudice and the Court reserved the right when the case might properly be before it to rule on whether it had jurisdiction of the subject matter of the suit.

It is respectfully submitted that under Supreme Court Rules 27 and 38 there is no sufficient assignment of errors, and the petitioner should not be heard.

SUMMARY OF THE ARGUMENT.

I.

The complaint does not state a claim on which relief can be granted to the plaintiff individually for fraud and deceit wherein the amount in controversy exceeds \$3,000.00 exclusive of interest and costs.

(a) The complaint fails to state a claim on behalf of the plaintiff for relief for fraud or deceit.

(b) The plaintiff's claim for damages in the sum of \$200,000.00 (or in any sum in excess of the jurisdictional amount) is colorable.

(c) The plaintiff cannot join claims of other members of the Society for separate frauds alleged to have been committed on them.

(d) Damages for fraud, deceit or other tort cannot be collected from the trust fund of the defendant Society provided for the payment of benefits.

II.

The complaint does not state a claim on which relief can be granted as a class action.

(a) This action does not profess to be and is not a class action.

(b) Plaintiff does not "fairly insure the adequate representation of all" [Rule 23 (a), Rules of Civil Procedure] of the members of the defendant Society.

(1) The plaintiff's interest is too small.

(2) The plaintiff's interest is not the same as the interests of those whom he would represent.

(c) Rights of members of the Society as such are governed by the laws of Alabama, the State of incorporation.

(d) Under the laws of Alabama the State Superintendent of Insurance is entrusted with the duty to protect the funds of the Society.

(e) As to the funds of the Society other than the trust fund, the members of the Society have no individual rights of action.

(f) The trust funds of the Society have never been dissipated nor impaired and are in no danger of being invaded.

(g) The plaintiff and the other members who he claims to represent have no such joint rights in the trust funds of the Society that they may be aggregated to make the jurisdictional amount.

(h) The plaintiff did not comply with Rule 23 of the Rules of Civil Procedure.

(i) The defendant Society is aligned in interest with the plaintiff, and the requisite diversity of citizenship does not exist as between the defendant Society and its officers, directors and trustees.

(j) Taken in connection with the record facts, the complaint fails to make a case as a class action against any of the defendants.

ARGUMENT.

I.

The Complaint Does Not State a Claim on Which Relief Can Be Granted to the Plaintiff Individually for Fraud and Deceit Wherein the Amount in Controversy Exceeds \$3,000.00 Exclusive of Interest and Costs.

• (a) The complaint fails to state a claim on behalf of the plaintiff for relief for fraud or deceit.

The plaintiff asks judgment for damages in the sum of \$200,000.00 (R. 146) for fraud and deceit alleged to have been perpetrated upon him as set forth in Paragraph 10 of his complaint (R. 137). He claims that an agent of the defendant society on or about November 10, 1934, by false representations made to him, induced him to procure a certificate of contingent endowment insurance issued by the defendant society. The certificate was for \$1,000.00; the total amount paid by plaintiff from the time of his application, November 10, 1934, until the time of the filing of the original complaint February 3, 1941 (R. 2), or for a period of six years, was \$202.35 (R. 41, 149), or less than \$34.00 per year. The alleged false representations as set forth in Subdivisions a and b of Paragraph 10 of the complaint are (R. 137):

“a. Said agent represented to plaintiff that: (1) plaintiff would have the number Five (5) position in his division; (2) plaintiff would ‘collect in two years easy’; (3) ‘we will fill this group before we start another one’; (4) there would be twenty-five (25) members in plaintiff’s division.

“b. Said agent further, in effect, represented to plaintiff that plaintiff’s division would be completely filled before any memberships were sold in any other divisions of plaintiff’s age class.”

The plaintiff says that he believed these representations to be true, and relied and acted on them. If this statement of his is true, then he entered the District Court with **unclean hands** and was properly cast therefrom, for he brands himself as well as the agent with the brand of frauds—a fraud sought to be perpetrated on the defendants as well as a fraud sought to be perpetrated upon other certificate holders of the plaintiff's age class. He says that one of the representations that he relied on and acted on was "Plaintiff would 'collect in two years easy.'" In other words, that plaintiff would collect from the defendant society \$1,000.00 before he had paid to the defendant society \$68.00. In the very nature of things he knew that for this to come to pass a fraud in all probability would be perpetrated on the defendant society. Yet he says that he relied and acted on this representation.

The record discloses that some of the representations alleged to have been made were true. The plaintiff concedes that the representation (1) Plaintiff would have No. 5 position in his division was true (Paragraph 10 of complaint, R. 137).

Representation No. 3, "We will fill this group before we start another one," was also true.

The defendant society did not after the date of plaintiff's application, November 10, 1934, start a single other group, class or division. It was prohibited from doing so by an Act of the Legislature of Alabama, approved July 30, 1931, referred to in defendant's answer (R. 150, Code 1940, Title 28, Sec. 3, App. 64). "Such . . . fraternal benefit society . . . shall not hereafter (after July 30, 1931) establish its policyholders or members into divisions or classes other than the divisions or classes, actually containing subsisting policies or certificates." Indeed, the plaintiff himself avers in Paragraph 15 of his complaint (R. 138) the following:

"a. Defendants opened a total of 1,456 divisions, and still have 1,454 divisions open.

"b. All the said divisions were opened prior to July 30, 1931, and long before defendants solicited plaintiff to apply for insurance." (Emphasis ours.)

And such averments were admitted by the defendants (R. 153).

The next representation alleged to have been made to and relied on by plaintiff is: "4. That there would be 25 members in plaintiff's division" (R. 137). The plaintiff knew that he was No. 5, and hence that there were only four other members in his division. It proved impossible to obtain 25 members in each division, though the defendants made every reasonable effort to secure as many members as possible up to 25 members in each of its divisions, and it is to the defendants' financial interest to secure as many members as possible in each division (R. 152, 153). New members were added to existing divisions so as nearly as possible to keep the same number of members in each division of a particular age class.

The form of contingent endowment certificate now issued by the defendant Society, and which has been the form in use for the past several years, is shown by Exhibit B to the answer (R. 59, 149). The last sentence of the second paragraph of the certificate (Exhibit B to answer, R. 59) reads: "Each applicant's certificate will be placed in the division of his class containing the fewest number of members."

The plaintiff complains, however, that the defendant Society's agent further in effect "represented to plaintiff that plaintiff's division would be completely filled before any memberships were sold in any other divisions of plaintiff's age class" (R. 137). Necessarily the plaintiff knew that this would constitute a fraud upon the members of the defendant Society in other divisions of the plaintiff's age class. Yet he says he relied on this being done and acted thereon.

The foregoing constitutes all of the false representation, fraud or deceit alleged to have been perpetrated on the plaintiff individually. We respectfully submit that the complaint does not state a claim for relief to the plaintiff for fraud or deceit.

(b) Plaintiff's claim for damages in the sum of \$200,000.00 (or in any sum in excess of the jurisdictional amount) is colorable.

The plaintiff claims that he should have his certificate of insurance remain in force, and in addition thereto should have damages in the sum of \$200,000.00, all because he alleges that by fraud and deceit he was induced to part with his dues in the sum of \$202.35 paid on a certificate which admittedly he knew could never be worth more than \$1,000.00.

It is submitted that the alleged fraud and deceit, which we have just commented on under (a), when considered with the admitted facts, does not make a case for the imposition of punitive damages.

"Punitive damages may not be recovered in such an action (deceit) unless the fraud is gross, malicious, oppressive and committed with an intention to so injure and defraud."

Southern Building & Loan Assn. v. Bryant, 225 Ala. 527.

If punitive damages are recoverable, then there has never been any contention nor any holding either of the District Court or of the Circuit Court of Appeals that exemplary damages may not be added to actual damages to make up the federal jurisdictional amount. The decision of the Circuit Court of Appeals is not contrary to the decisions of the Eighth Circuit Court of Appeals in the cases of Green v. Keithley, 86 F. (2d) 238, and Young v. Maine, 72 F. (2d) 640.

Both the District Court (R. 165, 166) and the Circuit Court of Appeals (R. 175) held simply that plaintiff's claim of \$200,000.00 damages to himself on his \$1,000.00 certificate was entirely colorable for the purpose of conferring jurisdiction, and both Courts cited *St. Paul Ind. Co. v. Cab Co.*, 303 U. S. 289. There is no controversy about the proposition that where exemplary damages are recoverable they may be added to the actual damages to bring the case within the jurisdiction of the District Court.

Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729;
Scott v. Donald, 165 U. S. 58, 89, 90, 41 L. ed. 632,
639.

Those cases are cited by this Court in *North American Transportation Co. v. Morrison*, 178 U. S. 262, 267, 44 L. ed. 1061, 1063, with the distinguishing principle here relied on added:

"But where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere *ad damnum* clause will not confer jurisdiction on the Circuit Court, but the Court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case."

The Fifth Circuit Court of Appeals has repeatedly recognized the principle that a claim of exemplary or punitive damages must be included in determining whether the jurisdictional amount is involved.

Ragsdale v. Rudich (5th C. C. A. 1928), 293 Fed. 182;

Scalise v. National Utility Service (5th C. C. A. 1941), 120 F. (2d) 938.

Nothing to the contrary was indicated in the opinion in the instant case, but the decision of both the District Court

and of the Circuit Court of Appeals was grounded upon the principle expressed in *St. Paul Mercury Ind. Co. v. Red Cab Co.*, 303 U. S. 283, 289, 82 L. ed. 845, 849:

"But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to receive that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."

The petitioner insists, however, that his mere claim of \$200,000.00 damages is sufficient to confer jurisdiction. Is it not legally certain that the plaintiff cannot recover that amount, nor any amount sufficient to bring the case within the jurisdiction of the District Court? The plaintiff has actually paid in premiums or dues a total of \$202.35 (R. 151) upon a certificate of insurance which, when matured, would be of the face value of \$1,000.00. Any right of the jury or Court to award punitive damages is not an arbitrary or unlimited discretion.

25 C. J. S., page 738, Sec. 126.

As said by the Alabama Supreme Court in *Alabama Water Service Co. v. Harris*, 221 Ala. 516, 519:

"Punitive damages, if wantonness appear, must rest in large measure within the discretion of the jury. But this is not an unbridled discretion.

"The nature of the case should be considered, the character and extent of injury likely to result from disregard of duty, and all the attendant circumstances. Judicial fairness, avoidance of any form of passion or bias tending to becloud the sense of justice, should be carefully maintained."

"The award (of punitive damages) should not be disproportionate to the actual damages sustained."

17 Corpus Juris, page 995, Sec. 293;

25 C. J. S., page 740, Sec. 126.

As said by the Alabama Supreme Court in the early case of *Mobile & Montgomery Railroad Co. v. Ashcraft*, 48 Ala. 15, 33:

“The punitive damages ought also to bear proportion to the actual damages sustained.”

The principle is probably more accurately expressed in the later decision of the Alabama Supreme Court heretofore quoted, *Alabama Water Service Company v. Harris*, 221 Ala. 516, 519, to the effect that in awarding punitive damages “The nature of the case should be considered, the character and extent of injury likely to result from disregard of duty, and all the attendant circumstances.”

The character and extent of the injury possible to result from any disregard of duty and the actual damages sustained could never in any case exceed the face amount of the certificate when matured, \$1,000.00. The Circuit Court of Appeals was correct in concluding, we submit, that (R. 175):

“The complaint contains not a single allegation of fact on which a judgment for damages claimed in excess of the value of his certificate could possibly be awarded. It is legally inconceivable that a person holding a certificate representing a claim for money which could not at the most bring more than \$1,000.00, could be entitled to a judgment for damages on account of being induced to purchase the certificate by representations that it was worth \$1,000.00 when, in fact it was worth less.”

(c) **Plaintiff cannot join claims of other members of the Society for separate frauds alleged to have been committed on them.**

The plaintiff alleges a separate fraud committed upon him (R. 137) and separate and “respective degrees of guilt of the personal defendants as to the various frauds” (R.

135). He further alleges in paragraph 24 (c) of his complaint (R. 144, 145) that defendants "have defrauded plaintiff and the other members of the Society by not informing them of the true facts concerning the operation of the Society and by nevertheless continuing to accept the members' moneys without making such disclosure."

It is submitted that such separate claims of fraud cannot be joined in a class action. It was well said by the New York Court of Appeals in a recent case (1937) that:

"The law offers a choice of remedies to a person who has been induced to act in reliance upon false representations. Each buyer of a certificate of an undivided share in a mortgage acquires by his purchase an individual right; and where such purchase is induced by fraud, the wrong done is a wrong to the buyer individually; the choice of remedy for such wrong rests with each buyer, and the cause of action is separate and individual. No buyer has an interest in the cause of action of another buyer, and, therefore, no buyer is a necessary or, indeed, even a proper party to an action at law brought by another buyer to recover the damages which he has suffered or the consideration he was induced by fraudulent misrepresentations to pay. * * *

"The purpose of a representative action is to permit an adjudication of a question in which others who are not parties to the action, though they might be made so, are interested. * * * In cases properly falling within this principle, wherein members of a class sue or are sued on behalf of other members of a class who have a common or general interest or are too numerous to be made actual parties, the judgment or decree is conclusive for and against those members of the class who are thus represented, in the absence of fraud or collusion." 1 Freeman on Judgments, S. 436. Cf. rule 8 of the Rules of Civil Practice. That result could not be extended to entirely separate causes of action, such as the plaintiffs have pleaded in this ac-

tion. There would be no basis then for determination of what parties are 'similarly situated.' "

Brennen v. Title Guaranty & Trust Co., 276 N. Y. 230, 114 A. L. R. 1010;

See also the annotation attached in 114 A. L. R. 1015 on the subject "Similar frauds practiced on various persons as basis of representative suit."

(d) **Any damages for fraud, deceit or other tort cannot be collected from the trust fund of the defendant Society provided for the payment of benefits.**

In the recent case (1942) of *Powell v. Gary*, 200 S. C. 154, 20 S. E. (2d) 391, the counsel from South Carolina appearing in the present case for the petitioner, were of counsel and apparently the petitioner himself was one of the litigants, for the Court comments that "About 1939 suits began to be filed charging the Company with fraud and deceit, and, in January, 1940, a policyholder by the name of Bell brought suit in the Court of Common Pleas for Richland County against the Company and its officers and directors, whereby the appointment of a receiver and liquidation were sought." The Court stated the issue as follows:

"The issue is: Do the funds of the Company necessary to constitute proper and legal reserves against the existing current policies constitute a fund exclusively so applicable and which cannot be reached by other creditors of the Company? In other words, is it a trust fund for that alone?"

After considering the pertinent South Carolina statutes, which are virtually the same in this regard as the Alabama statutes, the Court concluded:

"It is, therefore, held that the policy reserves constitute a special fund applicable to that purpose only."

In other parts of his complaint [see paragraph 26 (r) R. 145] the plaintiff claims that the funds of the Insurance Department of the defendant Society constitute "a trust fund for the benefit of plaintiff and other members of the Society." The plaintiff's claim for \$200,000.00 damages for alleged deceit is based on representations alleged to have been made to the plaintiff by the soliciting agent of the defendant Society (R. 137), and is, therefore, a claim for damages against the defendant Society itself. The Courts generally will not allow a trust fund to be impaired by the tort of the trustee.

65 Corpus Juris 661, Sec. 524.

The funds of a fraternal benefit society are clearly divided into a trust fund and an expense fund by express provisions of numerous sections of the Alabama statutes regulating fraternal benefit societies. (Code 1940, Title 28, Sections 176, 177, 180, 183 and 220, set out in full in the appendix to this brief.)

Section 176 provides that "The net beneficiary assessment collected upon such certificate shall be based upon the standard industrial table of mortality and interest at the rate of three and one-half per cent per annum, or upon a higher standard."

Section 177 provides that "The net beneficiary funds so collected shall be kept as separate and distinct funds, and shall not be liable nor used for the payment of debts and obligations of the society other than the benefits herein authorized."

Section 183 provides that "No part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses."

The decisions of the Supreme Court of Alabama very definitely define the trust fund:

"The endowment fund, arising from payment of a monthly assessment or premium of \$1 from each policyholder, is segregated into an expense fund, and a mortuary fund, the latter being **the permanent trust fund** held and invested for payment of death claims."

Grand Lodge K. P. of Alabama v. Shorter, 222 Ala. 404, 405, 122 So. 38;

See, also, Strother v. McCord, 222 Ala. 450.

"A diversion of mortuary funds was one cause assigned for the appointment of a receiver by the Jefferson Court. Grand Lodge v. Shorter, 219 Ala. 293, 122 So. 36; Id., 222 Ala. 404, 132 So. 617.

"This is upon the theory that such mortuary fund is a trust which can, pursuant to the constitution of the order be used for death claims only. It is the fund required by sections 8449, 8450, Code (now Code 1940, Title 28, Secs. 176, 177). The latter section of the Code also prohibits its use for the payment of debts and obligations other than death claims."

Carter et al. v. Mitchell et al., 225 Ala. 287, 291;

See, also, Most Worshipful Grand Lodge (colored) v. Callier, 224 Ala. 364, 370;

McCall v. Grand Lodge, 217 Ala. 194;

Grand Lodge K of P. v. Shorter, 219 Ala. 293, 294.

It is clear, therefore, that any damages to which the plaintiff might be entitled for fraud, deceit or other tort cannot be collected from the trust fund of the defendant Society provided for the payment of benefits. What fund of the defendant Society then is subject to the payment of any such tort damages? The report on the examination of the defendant Society as of December 31, 1939, showed that "the policy reserves are based upon an interest rate of three and one-half per cent" (R. 122). That is in compliance with Code 1940, Title 28, Section 176. That report showed the policy reserves as of December

31, 1939, to be \$779,765.00, and the unassigned funds to be \$261,134.73 (R. 109). The policy reserves constitute the trust fund, and the unassigned funds or surplus are the funds liable for expenses or any other legal claims. The separation of those funds is shown by years on Record Page 162, which shows the present surplus to be \$267,896.29. That constitutes the total fund of the Society which is not a trust fund for the payment of benefits, and out of this fund of \$267,896.29 the plaintiff asks for damages to himself in the amount of \$200,000.00.

It is respectfully submitted that the complaint does not state any valid claim on behalf of the plaintiff for relief for fraud or deceit, and, further, that even if any such claim is stated, the damages laid in the sum of \$200,000.00 or any sum in excess of the jurisdictional amount are entirely colorable for the purpose of conferring jurisdiction.

II.

The Complaint Does Not State a Claim on Which Relief Can Be Granted as a Class Action.

(1) This action does not profess to be, and is not, a class action. Rule 23, Rules of Civil Procedure, provides that under certain conditions one or more of a class may "on behalf of all" file a suit. The present action does not purport to be filed on behalf of any person other than the one individual plaintiff (R. 133 to 146).

"Where a suit is brought by or against a few individuals as representing a numerous class, that fact must be alleged of record, so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all."

McArthur v. Scott, 133 U. S. 340, 28 L. ed. 1015, 1032.

In *Gonzalez v. Roman Catholic Archbishop*, 208 U. S. 1, 19, it was held by this Court that an alleged right of the plaintiff to property as representative of heirs as a class cannot be given consideration in a suit not brought as a class suit:

The reason for the rule is cogently stated by the Supreme Court of Tennessee:

"The rule is founded in inherent justice, and could stand by its own strength, even if it were unsupported by the eminent authority which has been adduced in its behalf. It is without doubt highly important that the Court, by proper pleadings, should be apprised of the fact that the party named as defendant does not appear in the record in his own right merely, but, by construction of law, representing in his own person the rights and interests of others. Being so informed, the Court has imposed upon it a duty, especially in the supervision of agreements and compositions during the trial, as well as other points looking to a fair presentation of the case, similar to the duties imposed where the rights of infants are involved. And for a stronger reason must this be true, when the fact is considered that it is always in the power of one about to file such a bill to select such representatives as he may desire. And if bills may be so filed, ostensibly against one or a few persons only, without notice being brought to the Court that they are sued as representatives of a class, and afterwards the complainant be allowed to claim that the whole class is found, the most disastrous consequences might well happen to the estates of innocent persons, which the courts would be equally powerless to prevent or redress."

Brown v. Brown, 86 Tenn. 277, 316, 6 S. W. 869, 7 S. W. 640.

See, also:

McClelland v. Rose (5th C. C. A., 1918), 247 Fed. 721, Annotated Cases 1918 C, 341, 343;

Johnson v. Riverland Levee District (8 C. C. A., 1941), 117 F. (2d) 711, 715;

21 Corpus Juris, page 287, Sec. 287;

47 Corpus Juris, page 178, Sec. 332;

14 Corpus Juris, page 940, Sec. 1460;

18 C. J. S., page 1292, Sec. 570 (a).

The fact that some of the relief prayed may possibly benefit not only the plaintiff individually, but the defendant Society and the other members of the Society, does not make this action a class action. That same condition existed in the very similar case of Grand Lodge K. of P. v. Shorter, 219 Ala. 293, 296, but the Supreme Court held that the action was an individual suit and not a class action, saying:

"Complainants are beneficiaries of this trust fund, and have a direct interest in seeing that its integrity is maintained, that its proper status is restored, and that it is properly managed. They do not file this suit in a representative capacity. It is an individual suit. It may be assimilated to a suit by a taxpayer to prevent a city from wasting public funds. Though it may result in benefit to others, the purpose is to protect the rights of complainants."

Grand Lodge K. of P. v. Shorter, 219 Ala. 293, 296.

The more than ten thousand other members of the defendant Society (R. 138) either were satisfied or did not understand that they were invited to join with the plaintiff, for during the three months pendency of this litigation in the District Court not a single other member joined.

The Circuit Court of Appeals decided nothing more than that this action was not brought as a class action, but as an individual suit by plaintiff on his own behalf (R. 176). There are, however, many other fatal objections to the consideration of this action as a class action.

(b) The plaintiff does not "fairly insure the adequate representation of all" of the members of the defendant Society.

Rule 23 of the Rules of Civil Procedure authorizes a class action to be brought only by those who "fairly insure the adequate representation of all" of the class. It would be difficult to employ stronger language. The **adequate representation of all** of the class must be **fairly insured**. The plaintiff does not meet that requirement.

(1) The plaintiff's interest is too small.

The Seventh Circuit Court of Appeals in *Pelelas v. Caterpillar Tractor Co.*, 113 F. (2d) 629, 632, certiorari denied 311 U. S. 700, 85 L. ed. 454, in commenting upon Rule 23, said:

"The rule carried into the present code the essence of former Equity Rule 38, 28 U. S. C. A., following section 723. It is even more stringent; and under it the court is at liberty to consider the number appearing on record as contrasted with the number in the class; 2 Moore's Federal Practice, Section 23.03, p. 2234; and whether the relationship between the parties to the record is unique or one identical and common with that of all others of a class, 2 Moore Federal Practice, Section 23.03, p. 2225. There must be a sufficient number of persons to insure a fair representation of the class."

See also the discussion of the District Court in this case, *Pelelas v. Caterpillar Tractor Co.*, 30 Fed. Supp. 173, 176, where the following is quoted with approval from *Sparks v. Robinson*, 115 Ky. 453, 74 S. W. 176:

"But the one essaying to act for all must be a fair representative of the class, and this he must show to be entitled to claim the right. It was not enough that he should belong to the class whose alleged grievances or property rights he presumes to involve in litigation."

tion, but he must show such an interest that the court may see that his motive and financial concern are probably in harmony with at least the average of the body. It will be observed that the Code (section 25) makes this right permissive, which we understand to be in respect of the above rule, and to involve the exercise of the sound judicial discretion of the chancellor. If this were not so, then one with but slight interest in fact, but actuated by some other motive not common to, nor in keeping with, the welfare of those he would represent, could involve their property in a litigation to be conducted by such skill and labor as he would feel warranted to engage in his own small affair. This should not be allowed. Or, e. g., appellant, with an interest of 3 cents only, volunteers to litigate for property holders whose possessions are over \$9,000,000, and whose direct pecuniary concern is nearly \$15,000. He proposes to choose for them their lawyer, set the gauge of their litigation, control in a large measure the conduct of this to-be enormous suit, and have charged to them the whole of the costs (for appellant's proportion of the costs could not be measured in any denomination of money known to the law):"

The Seventh Circuit Court of Appeals again considered at length the question of the disparity between the number actually suing and the number in the class in the recent case of *Weeks v. Bareco Oil Co.* (1941), 125 F. (2d) 84, 91, 92.

In *Pacific Fire Insurance Co. v. Reiner* (District Court Eastern District Louisiana 1942), 45 Fed Supp. 706, it was held that one out of a class of five thousand did not adequately represent the class.

In the present case the plaintiff is one out of 10,241 members of the defendant Society (R. 138). A large number of those members carry their insurance on an entirely different plan (R. 118). The plaintiff has contributed a total of only \$202.35 (R. 151 and 43) to assets of the

defendant Society totaling \$1,283,355.64 (R. 141, 156, 122). The plaintiff's policy of insurance when matured would be of the face value of \$1,000.00 as compared with insurance in force of \$12,143,000.00 (R. 118). Upon any basis of comparison, the number of members of the defendant Society, the possible interest in its assets, the amount of insurance as compared with the total amount of insurance in force, the plaintiff represents less than two one-hundredths of one per cent of all of the members of the defendant Society. It is fantastic, we submit, to assert that such representation fairly insures the adequate representation of all. Surely the interest of plaintiff's lawyers must far exceed the interest of plaintiff himself. The well established rules of public policy forbidding champerty and maintenance prevent the Court from taking jurisdiction of this action for the benefit of persons who are not parties to the record.

(2) Plaintiff's interest is not the same as the interest of those whom he would represent.

As said by the Supreme Court of the United States in the recent case of *Hansberry v. Lee*, 311 U. S. 32, 132 A. L. R. 741:

"A selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

In Alabama one of the prerequisites of the operation of the doctrine of virtual representation is that "the relationship between the parties present and those represented should be such as to afford reasonable assurance of proper defense."

Culley v. Elford, 187 Ala. 465.

"The Bill must show that those made parties have such interest as to induce them to bring forward the entire merits of the question."

Ussery v. Darrow, 238 Ala. 67, 74.

"In a class action the plaintiffs should not introduce any question of priority or any matter which may give rise to a contest or opposition between themselves and any of those whom they wish to represent."

South East Nat. Bank v. Board of Education (1938),
298 Ill. App. 92, 18 N. E. (2d) 584 (followed in
[1938] 298 Ill. App. 621, 18 N. E. [2d] 599, 601,
602, 603).

For farther authorities we refer to the note attached to the opinion in *Hansberry v. Lee*, supra, in 132 A. L. R. 749, on "Identity or community of interest essential to class or representative suit."

The plaintiff insists that he is in good faith in claiming \$200,000.00 as damages to himself from the defendant Society. We have already commented that that claim of \$200,000.00 cannot be from the trust fund for the payment of benefits, but must be from the surplus, which consists of \$267,896.29 (R. 162). The plaintiff alleges that other members of the Society have been similarly defrauded [paragraph 24 (c) of complaint, R. 144]. If a single other member should claim even one-half the amount claimed by plaintiff, and the two should be successful, then the defendant Society would be left with no surplus or operating funds. In that event would the 10,239 other members of the defendant Society who receive nothing feel that they had been adequately represented?

But, says the plaintiff, if I may not represent the other members of the Society, I may represent the Society itself in enforcing a claim against its officers, directors and trustees. Is it conceivable that the plaintiff may in one

part of his action sue the Society as defendant and claim a recovery against the Society for the enormous sum of \$200,000.00, and then in another part of the same action sue for the benefit of the Society against the officers, directors and trustees of the Society! The plaintiff cannot in one breath condemn and in the other breath support the defendant Society. His interests are conflicting and his positions are antagonistic.

The plaintiff complains that the defendant sold insurance in other divisions at plaintiff's entry age before filling plaintiff's division (see paragraph 16 of the complaint, R. 138). Unless the defendant had treated the members in all existing divisions upon the same basis, a fraud would have been perpetrated upon members in other divisions. The defendant avoided any such unfair treatment by providing in its certificate of insurance that "each applicant's certificate will be placed in the division of his class containing the fewest number of members" (Exhibit B to answer, R. 59).

The plaintiff's claims are clearly hostile to members in other divisions of his same age class. Not only is this true, but it is difficult to imagine any two members or certificate holders the value of whose certificates or memberships depend upon the same thing. They all vary with the facts, such as the age of the certificate or policy, the age of the certificate holders or policyholders, the position of the certificate holder or policyholder in his division, the condition of the health of the member, the condition of the health of others in the division of the certificate of the member, and the plan of insurance upon which the members' certificate was issued. Several hundred thousand dollars of insurance was issued on plans entirely different from the plan of the plaintiff's insurance, as Ordinary Life Insurance, 20 Pay Life Insurance, Endowment at age 85, Yearly Renewable Term Insurance, and miscellaneous plans (R. 118). Members holding insurance upon

such totally different plans cannot possibly be adequately represented by the plaintiff.

In a case almost on all fours with the present case, *Eberhard v. N. W. Mutual Life Ins. Co.*, 241 Fed. 353, 356, the Sixth Circuit Court of Appeals said:

“Each represents a different class, since the policy of each matures at a time different from the others.”

In 39 American Jurisprudence, page 922, Sec. 47, the rule is well stated:

“Persons having interests adverse, antagonistic, or hostile to those of the persons purported to be represented cannot maintain a representative or class suit in behalf of the latter, or be sued as their representatives.”

(c) The rights of the members of the Society as such are governed by the laws of the State of Alabama, the State of incorporation.

In *Sovereign Camp W. of W. v. Bolin*, 305 U. S. 66, 75, this Court said:

“The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the state where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation. Another state, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicil.”

In *Modern Woodmen of America v. Mixer*, 267 U. S. 544, 551, 69 L. ed. 783, 785, this Court said:

“The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced, and the conse-

quence that their rights must be determined by a single law, is elaborated in *Supreme Council, R. A. v. Green*, 237 U. S. 531, 542, 59 L. ed. 1089, 1100 L. R. A. 1916A, 771, 35 Sup. Ct. Rep. 724. The act of becoming a member is something more than a contract—it is entering into a complex and abiding relation—and as marriage looks to domicil, membership looks to and must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do, but we deem it established that they cannot attach to membership rights against the company that are refused by the law of the domicil. It does not matter that the member joined in another state."

(d) Under the laws of the State of Alabama the State Superintendent of Insurance is entrusted with the duty and responsibility to protect the funds of the Society.

The Superintendent of Insurance of Alabama has ample authority under the statutes of the State to correct each and all of the alleged abuses of which the plaintiff complains.

See Alabama Code 1940, Title 28, Sections 46, 58, 222, 223, 224, 225, 261, 266, 268 and 269 copied with other sections in the appendix of this brief.

Indeed, the record shows conclusively that the Superintendent of Insurance has been diligent and has already effected the reorganization which the plaintiff professes to desire. He is in much better position to perform that administrative function than is the Court, for the Court might appoint a receiver under whose supervision an election of officers and trustees would be conducted strictly in accordance with the laws of Alabama and the laws of the Society, and yet the new officers might continue the abuses complained of or might perpetrate even worse abuses. Let it be said sadly that too often such has been the experience of our democratic forms of government. The Superintendent

ent of Insurance, however, has the administrative power and authority not only to see that the members are adequately represented in election of officers, but further to require those officers to perform their duties. The Superintendent of Insurance of Alabama has exercised that authority, as is shown by the report on examination of the defendant Society as of December 31, 1939 (see especially R. 121, 122).

In McGarry v. Lentz et al. (6th C. C. A. 1926), 13 F. (2d) 51, certiorari denied 273 U. S. 716, 71 L. Ed. 855, it was well said;

“With so large a number of policy holders as is usual, each of whom is a member of the society, and therefore with an equally large number of separate and possibly divergent views upon questions of management, the usefulness of any such society, the power of its officers and directors, and the success of its purpose might be seriously impaired, if every member were permitted, under the claim of being a cestui que trust, to litigate questions of policy or of rights affecting the membership as a whole. The need is apparent of centralizing control, and of providing the exclusive manner in which members may question acts or policies affecting the entire membership. As to all questions of internal management, including the necessity or propriety of dissolution and receivership proceedings, and not excluding current questions arising in the normal conduct of its business, as to which latter injunction or quo warranto would be the indicated remedies, we think it was intended that the decision of the board intrusted with such management would be final and conclusive, unless questioned through action by the Attorney General of the state, or through other means provided by the by-laws of the corporation, and not inconsistent with the law of the state or its charter.

“In view of the quasi public nature of fraternal benefit societies, the undoubted power of control of the

state over its own corporations, the assumption of general supervisory powers and control by the state, and the necessity of and reason for a centralization of management, protected from attack except in the general interest of all, as represented by the Attorney General, we conclude that this statutory provision is purely regulatory. Our reasons for this conclusion find support in numerous decisions. See *Swan v. Mutual Reserve Fund Life Ass'n*, 155 N. Y. 9, 49 N. E. 258; *Uhlman v. N. Y. Life Ins. Co.*, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; *Delaney v. Anc. Order of United Workmen*, 244 Mass. 556, 138 N. E. 918; *Baird v. Modern Samaritan*, 162 Minn. 274, 202 N. W. 498; *Albach v. Fraternal Aid Union*, 100 Kan. 511, 164 P. 1065; *Lowery v. State Life Ins. Co.*, 153 Ind. 100, 54 N. E. 442."

See, also, *Paul v. Kraemer*, 24 Fed. Supp. 353, 355; *Soptich v. St. Joseph National Croatian Beneficiary Assn.* (1926 D. C. Kan.), 34 F. (2d) 566.

In the recent South Carolina case, *ex parte Rowley* (1942), 200 S. C. 174, 20 S. E. (2d) 383, at 387 (and in which we observe petitioner's South Carolina attorneys were counsel for the complaining certificate holders), the South Carolina Supreme Court quotes with approval certain authorities in which it states "Industrious counsel for the appellant have submitted," and those authorities are so apt here that we repeat the quotations:

"In *Swan v. Mutual Reserve Fund Life Assn.*, 155 N. Y. 9, 49 N. E. 258, the Court said:

" * * * The effect of the legislation was not to cut off the rights of a party, but merely to prescribe the form of the remedy which he must avail himself of in the pursuit of his object to compel the corporation to perform acts or to account as to matters in respect of which it may be alleged to have been negligent or wasteful or mistaken. The plaintiff is not maintaining a purely and essentially private action, with the

result of which only himself and the corporation defendant are concerned; but he is maintaining one which concerns a large body of the public, and the condition and management of the affairs of a particular class of corporations, which have been the especial objects of the care and watchfulness of the State. It is no particular hardship to him, and it impairs none of the force of the obligations of the company to him, that he should be compelled to follow the particular procedure declared by Statute . . .

“ ‘If the views which I think we should adopt upon the question before us are not correct, then these corporations, chartered by the State as they are for the common benefit of those who wish to co-operate in the business of life insurance, are at the mercy of any member who, with unworthy or dishonest motives, chooses to attack them, and, by threatened interference with their methods or management, may compel them to make a settlement with him in order to secure, as was said in the Uhlman case, freedom from troublesome, expensive, unnecessary and wholly disingenuous investigations into affairs and accounts running through many years.’ ”

“In *Baird et al. v. Modern Samaritans et al.*, 162 Minn. 272, 202 N. W. 498, is the following:

“ ‘. . . Good reasons readily suggest themselves for the enactment of Section 3482. In associations of this sort every one insured is a member. If any dissatisfied or disgruntled member on his own motion may drag the association and its governing body into court as to the conduct of its business or methods of procedure, its usefulness will be seriously impaired and its very existence endangered. The mere fact that an action is brought affects the standing of such an association without regard to whether or not any basis exists for so doing.’ ”

“In *Delaney et al. v. Grand Lodge*, 244 Mass. 556, 138 N. E. 918, the Supreme Judicial Court of Massachusetts said:

“This branch of the present proceeding is without the scope of this statute. It doubtless was designed to prevent hostile attacks upon an institution in which large numbers of persons are interested, except through the instrumentality of a public officer, and to render impossible the harm which might come to a solvent and worthy beneficiary corporation insuring great numbers of people through ill-considered proceedings. The business of insurance is invested with general public interest and is subject to State regulation within rational bounds. Any act of the Legislature directed to this end within reasonable limits will be upheld.”

Ex Parte Rowley (1942)—S. C.—20 S. E. (2d) 383.

Counsel for petitioner will doubtless call to our attention that the opinion in that case further comments that “the Courts of some other States, notably Alabama and Colorado, have held in effect * * * that in cases of insolvency or fraudulent operation, the Court will entertain an application for receivership on the part of an individual certificate holder.” We shall come to the Alabama cases mentioned immediately, and shall show that the principle of those cases applies only when the trust fund has been invaded.

(c) As to funds of the Society other than the trust fund, members of the Society have no individual rights of action.

We have already shown that the trust fund is the policy reserve required by Alabama Code 1940, Title 28, Sections 176 and 177. (See ante this brief, pages 27-30).

Section 180 of the same Title hereafter copied in the appendix to this brief provides, in part:

“Any society may create, maintain, invest, disburse, and apply an emergency, surplus or other similar fund

in accordance with its laws. Unless otherwise provided in the contract, such fund shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in section 172 of this title."

Section 172 referred to, also copied in the appendix, provides the conditions under which the Society may grant to members extended and paid-up protection. There is no provision for paying dividends to the members as complained of in Paragraph 23 (a) of the complaint (R. 143), but the defendant Society has without additional charge given its members paid-up and extended insurance as a part of their certificates, and this was approved by the Insurance Department of the State of Alabama (R. 159).

Again, Code 1940, Title 28, Section 220, copied in the appendix, provides that nothing contained in this article shall prevent the maintenance of a surplus "nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its by-laws."

It is clear, we submit, that the surplus fund, or the fund other than the trust fund, under the laws of Alabama is "for the use and benefit of the Society," and not of the individual members, and that, under the statutes of Alabama, the supervision of the handling of the surplus fund is committed exclusively to the Superintendent of Insurance and the Attorney General. (See Code 1940, Title 28, Sections 223, 224 and 225.)

It will be noted that Section 225 has been broadened since the decision in *Grand Lodge v. Shorter*, 219 Ala. 293, so that now, "irrespective of the matter of dissolution of any such Society," the right to protect the trust fund of

the Society is vested also in the Attorney General. True, in the absence of any action on the part of the Attorney General, individual members have a right to bring proceedings for the protection of the trust fund, that is, the fund provided by Code 1940, Title 28, Sections 176 and 177, from which benefits shall be paid.

McCall v. Grand Lodge, 217 Ala. 194;
Grand Lodge v. Shorter, 219 Ala. 293;
Grand Lodge K. P. of Ala. v. Shorter, 222 Ala. 404,
405, 122 So. 38;
Strother v. McCord, 222 Ala. 450;
Carter et al. v. Mitchell et al., 225 Ala. 287, 291;
Most Worshipful Grand Lodge (Colored) v. Callier,
224 Ala. 364, 370.

In each of the Alabama cases the suit of the individual member was to prevent the wrongful use of the trust fund. It is respectfully submitted that the individual members have no individual rights of action for the protection of the surplus or other funds exclusive of the trust fund.

Alabama Code 1940, Title 28, Sections 180 and 220.

The duty and responsibility to protect the surplus funds of the Society is vested exclusively in the State Superintendent of Insurance and the State Attorney General.

Alabama Code 1940, Title 28, Sections 46, 58, 222, 223, 224, 225, 261, 266, 268, 269.

(f) The trust funds of the Society have never been dissipated or impaired, and are in no danger of being invaded.

It is without dispute that adequate reserves have always been maintained and that the trust fund of the defendant Society has never been invaded for salaries, expenses or other unauthorized disbursements, and is in no danger of any such invasion. In fact, the surplus above the trust

funds have shown a remarkable and continuous yearly increase (R. 162):

Year	Surplus
1929.....	\$ 1,263.04
1930.....	9,412.59
1931.....	16,999.84
1932.....	33,166.84
1933.....	44,411.66
1934.....	94,711.52
1935.....	147,388.92
1936.....	171,876.47
1937.....	192,417.54
1938.....	250,180.58
1939.....	267,896.29

See, also, R. 109, 118.

The petitioner places much reliance upon a South Carolina case in which the petitioner's South Carolina counsel appeared as attorneys for the complaining members of the Society, Ex parte Rowley, 200 S.C. 174, 20 S. E. (2nd) 383, and petitioner quotes from that case on page 32 of its typewritten brief to show that a receiver might be appointed even though the Society was not insolvent. The last words of petitioner's quotation (its typewritten brief, page 32) are "insolvency of the Company was not necessary." The petitioner stopped in the middle of a sentence, and we respectfully submit should have completed that sentence (20 S. E. 387), "**but is very clearly indicated by the facts before us.**"

In the present case the undisputed facts not only established the solvency of the defendant Society, but also that both its trust fund and its surplus have increased every year of its existence (R. 162, 109, 118). Certainly under such circumstances the plaintiff has not made a case for relief to be granted to the plaintiff as a representative of the members of the defendant Society with respect to its trust fund.

(g) The plaintiff and the other members who he claims to represent have no such joint rights in the trust funds of the Society that they may be aggregated to make the jurisdictional amount.

The decisions of Federal Courts have made clear, we submit, that there are no such joint claims on the part of individual members of the defendant Society that they may be aggregated to make the jurisdictional amount. The plaintiff does not hold the status of a stockholder in the Society. The Society has no stockholders. The Society can never owe him or the beneficiary named by him in the certificate more than \$1,000.00. When this sum is paid, whether to his named beneficiary upon his death, or to him when he is number one in his division and the death of another member of the division occurs, his relationship and his estate's relationship with the Society are terminated and ended forever. He and his estate go, but the Society continues to live. Its life is not limited by the law, its charter is perpetual. When the stockholder of a corporation dies the corporation pays to the stockholder's estate nothing whatever. The assets of the corporation are not reduced one dollar or one penny. The estate of the deceased stockholder steps into the shoes of this stockholder and continues to go along with the corporation. The only financial or money claim that a certificate or policyholder has against the Society is measured by the terms of his certificate or policy. He, so to speak, is a quasi or prospective creditor of the Society. His claim against the Society can never exceed \$1,000.00. If he defaults in the payment of dues he may cease to have any claim, or, so to speak, step out of the Society, or, under the by-laws of this Society, if he has paid for as much as three years he automatically becomes entitled to a paid-up policy, for a much smaller sum, or a policy insuring his life for \$1,000.00 for a limited period of time.

The potential value of each certificate or policy depends upon many different things, and rarely, if ever do any two certificates or policies issued by the Society have the same potential value. However, there is one thing certain, and that is none of the certificates can possibly have a value in excess of \$1,000.00.

The law was most aptly and clearly stated by Circuit Judge Minton for the Seventh Circuit in the late case (1942) of *Andrews v. Equitable Life Assurance Society*, 124 Fed. (2nd) 788, 790, and enough of the other pertinent authorities which we have found were quoted and explained by Judge Minton:

"In determining whether or not such claims can be aggregated for the purpose of determining the jurisdictional amount, the question to be decided is not whether there is a common fund large enough to meet the test. The question is the nature of the plaintiff's claim in and to that fund. If the claims of the plaintiff and the persons he purports to represent are joint, they may be aggregated to make the jurisdictional amount.

"The size of the fund may then control. But where the claims, as in the case at bar, are several as against the fund, then the claims cannot be aggregated to make the jurisdictional amount. The decisions are clear on this point. In the case of *Eberhard v. Northwestern Mutual Life Insurance Co.*, 6 Cir., 241 F. 353, 355, the facts were very similar to the facts in this case. Three policyholders had filed a bill on behalf of themselves and all others similarly situated, in which it was alleged that a fund had been created by premiums paid in excess of the cost of insurance and by the amounts paid in by policyholders who did not survive the periods covered by their respective policies, or who had forfeited their policies or right of participation in the fund, by nonpayment of premiums. The plaintiffs asked for an accounting of the fund and a distribution on a proportionate basis. The fund

amounted to several million dollars, and it was alleged to be held by the company in trust for the plaintiffs and holders of similar policies.

“The defendant moved to dismiss the complaint and the lower court sustained the motion. The Circuit Court of Appeals affirmed it solely on the ground that the District Court was without jurisdiction. In that case the plaintiffs contended, just as the plaintiff does here, that the fund rather than the amount of each individual claim determined the jurisdiction. The court rejected this contention, saying: ‘It cannot be doubted that such rights as each policyholder has depend upon his contract with the insurance company and are measured by its terms. The policy is an agreement to pay its holder a computable sum of money upon certain conditions. His interest does not depend upon, and is not related to, the interest of any other policyholder similarly situated. True, there is some relation between the total number of qualified policyholders and the amount each will receive, but this mutual relationship is remote from that common interest which requires the claims of all to be jointly litigated, in order to ascertain the particular sum in which any one is entitled. The rights of policyholders are not derived from the same, or a common, title. The right each has in the fund is based upon the separate, distinct contract each has with the company with respect thereto. The sole matter in dispute is between the defendant and each complainant, as to the amount the latter shall recover. Each policyholder has no demand upon any other; his demand is against the defendant alone, and what he may receive from the defendant can in no way affect the claims of others. The policyholders’ claims to the fund are several, and not joint, and the amount payable to each depends upon his contract alone.’”

“This case was cited with approval and twice followed in this court: *Robbins v. Western Automobile Insurance Co.*, 4 F. (2d) 249; *Woods v. Thompson*, 14 F. (2d) 951. In the *Robbins* case the plaintiffs, resi-

dents of Illinois, sued the defendant, a Kansas corporation, in the Supreme Court of Cook County, Illinois, on behalf of themselves and others similarly situated, to enforce their claims arising out of insurance policies issued to them (the policies having been canceled) and to distribute a certain fund that had been accumulated by the defendant from the premiums paid in by the policyholders. The case was removed by the defendant to the Federal Court. A motion to remand was denied. Answer was filed, and the case went to trial, and the defendant got judgment. The plaintiffs' appeal attacked the jurisdiction of the Federal Court. It was conceded that none of the plaintiffs had paid a premium in excess of \$200.00. Judge Evans, speaking for the court, said (4 F. [2d] 250): 'Plaintiffs' claims are separate and distinct, and, in order that the federal court may acquire jurisdiction, the claim of one plaintiff should exceed \$3,000 * * *'. And upon the authority of *Eberhard v. Northwestern Mutual Life Insurance Company*, supra, Judge Evans rejected the contention of the defendants that the size of the fund which was in excess of the jurisdictional amount controlled, and held that the District Court was without jurisdiction, and ordered the case remanded to the state court.

"In the *Woods* case two suits were brought by former policyholders of the Illinois Bankers Life Association. The policyholders contended that 'members of an assessment insurance association * * * have common and undivided interests in the assets thereof * * *' (14 F. [2d] 952). They argued they had a common and undivided interest in a trust fund held for them and more than 60,000 other policyholders, and that they might aggregate their claims to this trust fund for jurisdictional purposes. Judge Anderson rejected this contention, and held that the matter in controversy was the interest and claim of each policyholder, and that the claim of each was separate and distinct. Judge Anderson said (14 F. [2d] 952): 'Appellees' cases are not helped by the aver-

ments that they are class suits, brought by them on behalf of themselves and of other policyholders. The practice of allowing suits to be so brought for convenience and economy does not affect the question under discussion. So far as concerns the relation of the appellees to the company as policyholders and members of it and their relation to its funds and assets, we are not able to perceive, and there has not been pointed out to us, any substantial difference between the instant cases and *Robbins v. Insurance Co.* and *Eberhard v. Insurance Co.*, *supra*. Every contention as to the aggregation of the several claims, and as to the amount of the trust fund determining the amount in controversy, is concluded by these decisions, and nothing would be gained by repeating the reasons and conclusions stated in them

“From what we have said it follows that the District Court was without jurisdiction, and the motion to dismiss was properly sustained.”

Andrews et al. v. Equitable Life Assur. Soc. of United States et al., 124 F. (2d) 788, 791.

The Court of Appeals for the Sixth Circuit in the case of *Eberhard et al. v. Northwestern Mutual Life Insurance Co.*, 241 Fed. 353, in a well reasoned and considered opinion, denied Federal Court jurisdiction in a case on all fours with the case here, and that decision is cited with approval in the very similar case in the Supreme Court of the United States of *Lion Bonding & Surety Co. v. Karatz*, 262 U. S. 77.

It is respectfully submitted that the record makes no case of joint individual rights of the members, such as to be aggregated in a class suit to confer jurisdiction upon the Federal Court.

(h) The plaintiff did not comply with Rule 23, Rules of Civil Procedure.

The defendant Society in its answer averred (R. 163):

“Further answering, this defendant says that the plaintiff does not show that he has attempted to obtain relief within the Society, and the complaint does not set forth with particularity the efforts of the plaintiff to secure within the Society or from the Directors and Trustees such action as he desires, nor the reasons for the plaintiff's failure to obtain such action, nor the reasons for not making such effort. Further answering, this defendant says the plaintiff does not show that he has attempted to obtain relief before the Superintendent of Insurance of the State of Alabama, the officer vested by the Legislature of Alabama with supervision over the operation of Insurance Companies, and fraternal benefit societies, such as this defendant, and this defendant further avers that the plaintiff can obtain any relief to which he is legally or equitably entitled within the Society, and further can obtain any relief to which he is legally or equitably entitled before the Superintendent of Insurance of the State of Alabama.”

The complaint does not, as required by Rule 23, “set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.” As far as the plaintiff goes in this respect is to aver by way of conclusion “that any attempt to obtain relief within the Society would be futile” (Appellant's App. 47). Has the plaintiff tried to bring upon the Society and its members the pressure, authority and power of control of the Superintendent of Insurance of Alabama? The plaintiff does not so aver. We submit that the law would place upon the plaintiff the duty of taking all lawful steps to secure relief within the

Society, including complaints to the proper administrative official, and the bringing into effect of the regulatory powers of the Superintendent of Insurance. The plaintiff has never complained in the slightest to the Superintendent of Insurance of Alabama, and yet that officer has ample authority under the statutes of the State of Alabama to correct each and all of the alleged abuses of which the plaintiff complains. (See Alabama Code 1940, Title 28, Secs. 46, 58, 223, 261, 266, 268, 269, copied with other Sections in the Appendix of this brief.)

(i) The defendant Society is aligned in interest with the plaintiff.

The petitioner (plaintiff) now claims that his action was a class action either on behalf of the members of the Society for the protection of the trust funds, or on behalf of the Society itself for the protection of the Society's assets. In neither phase is any fault whatever charged against the defendant Society, the corporation itself. The only such charge is contained in Paragraph 10 of the complaint (R. 137) wherein the plaintiff attempts to set up a claim for himself alone for fraud or deceit. If the present action is a class action, the interest of the defendant Society is directly opposed to the interest of the other defendants. The defendant Society is aligned in interest with the plaintiff, and hence the requisite diversity of citizenship does not exist.

As said in *Pharr v. Detroit Trust Co.* (6 C. C. A. 1941), 116 F. (2d) 807, 811:

"It is clear, from the record, that appellant is beneficially interested in the granting of the relief sought by the plaintiffs in the original action and that he is on their side of the controversy. It follows from so aligning the parties that his sole controversy is with citizens of his own state. *De Graffenreid v. Yunt-Lee Oil Company*, 5 Cir., 30 F. (2d) 574; *Magnolia*

Petroleum Company v. Suits, 10 Cir., 40 F. (2d) 161. The court below properly dismissed appellant's cross-claim for want of jurisdiction."

See also *Indianapolis v. Chase National Bank*, 314 U. S. 63, 69, 86 L. Ed. 48, 50;

* 2 Moore Fed. Practice-2272, Note 132 A. L. R. 197; *Ga. Coast & P. R. Co. v. Lowenthal*, 238 Fed. 795, certiorari denied 243 U. S. 644;

Stephens v. Smart, 172 Fed. 466;

Brown v. Denver Omnibus & Cab Co., 254 Fed. 560, 567;

Kelly v. Dolan, 218 Fed. 966, 971, affirmed 233 Fed. 635;

McLean v. State of Mississippi ex rel. Roy, 96 Fed. (2d) 741, 119 A. L. 670, 672.

(j) Taken in connection with the record facts the complaint fails to make a case as a class action against any of the defendants.

The complaint makes only broad and sweeping charges against the officers, directors and trustees of the defendant Society.

It charges that the contract of the defendant, Spencer H. Longshore, is void because it was entered into by the trustees of the ~~defendant Society~~ (Paragraph 22 (k) of complaint, R. 143). Those trustees were duly constituted as such by law and with full authority as such trustees (R. 158). Under the Alabama statutes the trustees were vested with the management of the Society, and had authority to enter into the contract.

Code 1940, Title 28, Sections 258 and 184, set out in the appendix.

By a meeting of the trustees on December 2, 1939, some time before the filing of this action, the commissions of the said Spencer H. Longshore were reduced and the term of his contract was reduced from twenty-five years to fifteen years, making it expire on March 1, 1944 (R. 121).

While his compensation has been apparently large as salaries go in the South, it is in line with compensation received by officers of similar organizations throughout the country. His compensation is on a commission basis and is predicated on the growth of the Society resulting from his efforts. His contract was entered into when the Society had but \$5,000.00 in assets and only about 500 members. The subsequently remarkable growth of the Society has been due largely to his efforts (R. 157). The ratio of expenses to total income of the Society is less than the average ratio of expenses to income of the majority of fraternal benefit societies operating on substantially similar lines throughout the United States (R. 157, 158). The requirements of the Superintendent of Insurance of Alabama have always been promptly complied with (R. 158). When taken in connection with the record facts which have been set forth at some length in our statement of the case, we respectfully submit that the complaint fails to make a case in favor of the defendant Society against any of its officers, directors or trustees.

Only one further contention remains to be answered, and that is the contention designated as Point Three in the petitioner's brief (Petitioner's typewritten brief, page 23):

“Point Three.

“The contracts upon which premiums have been paid to create this trust fund were wagering contracts, no insurable interest existing between the policy-holders, and therefore contrary to public policy and void.”

What we have already said to show that this action is not a class action, that the plaintiff does not “fairly insure the adequate representation of all” of the class; that the rights of the members of the Society are governed by the laws of the State of Alabama; that, under the laws

of Alabama the Superintendent of Insurance is entrusted with the duty to protect the funds of the Society; that the plaintiff did not comply with Rule 23, and that the defendant Society is aligned in interest with the plaintiff; are all fatal to any relief upon this contention. In addition, we note the following grounds why this contention cannot prevail:

1. It is not one of the assignments of error.
2. It is not one of the questions presented by the petition for certiorari. (See ante this page 13.)
3. The plaintiff, being a party to the alleged wagering contract, can have no relief on it.
4. No relief was asked in the complaint because of the claim that the insurance contract is a wagering contract (R. 144, 146), and the only relief even suggested was that "plaintiff is entitled to have his certificate reformed so as to be an ordinary certificate of whole life insurance" (Complaint, paragraph 27, R. 145 and 146).

The learned District Judge in his opinion fully and completely answered that suggestion (R. 166 and 167):

"Although such relief is not specifically prayed, the suggestion is made in paragraph 27 of the complaint that 'plaintiff is entitled to have his certificate reformed so as to be an ordinary certificate of "whole life" insurance.' If so, then plaintiff might remain interested in the insurance funds of the defendant Society even after any money judgment to which he might now be entitled had been paid. But there is no claim that the plaintiff applied for or intended to take an ordinary certificate of 'whole life' insurance. The plaintiff contends that the agent of the defendant Society induced him to apply for the certificate of contingent endowment insurance by certain alleged false and fraudulent representations; that the defendant Society bound itself to maintain the division in which plaintiff held membership at a strength of 25

members, which would enhance the probability of early collection of the insurance by plaintiff as an endowment; that the defendant Society has never had 25 members in any division and has no reasonable expectation of ever filling any division, and that 'this entire scheme of insurance is an illegal lottery and constitutes an illegal and unlawful scheme to defraud, and that it is also a wagering contract.' (See paragraph 24, subdivision b, of complaint.) The truth of any or all of these contentions if established would not entitle the plaintiff to have his certificate reformed so as to be an ordinary certificate of 'whole life' insurance. It is fundamental that, 'The instrument can only be reformed to conform to the parties' agreement. * * * Equity cannot make a new contract for the parties, or add new terms thereto.' 53 C. J., p. 909, Sec. 5. Or, as expressed by the Ninth Circuit Court of Appeals in *Bartelme v. Merced Irrigation District*, 31 F. (2d) 10, 13:

" 'Power to reform instruments for fraud or mistake is universally conceded to courts of equity, but a court of equity has no power to reform a contract, so as to insert in it a provision which the contracting parties never intended it to contain. It can go no farther than to make the contract express the true intention of the parties as to its provisions. In other words, it can make the contract only what the parties intended it to be.' "

Further, it was not necessary for plaintiff to have his policy or certificate reformed, for he had a right under the certificate (paragraph 1, R. 57; Exhibit A to answer) to change his certificate for a certificate upon any of the other ordinary ~~plans of insurance~~ issued by the Society (R. 118).

(5) Under the statutes and laws of Alabama the contingent endowment insurance contract is a valid contract. That form of contract is specifically authorized by the

statute law of the State of Alabama (General Acts of Alabama 1927, page 219, Alabama Code 1940, Title 28, Section 3, both set out in the appendix).

Petitioner's South Carolina counsel raised the same questions in other cases in the State of South Carolina, and the opinion of the Supreme Court of South Carolina, we submit, is conclusive. In *Gary v. Atkinson*, 200 S. C. 166, 20 S. E. (2d) 388, it is said:

"Turning to the sustaining grounds, which, incidentally, are barely touched in respondents' brief, we find that the first is a repetition of the second ground of the demurrer, undecided below, to the effect that the insurance contracts involved were fraudulent in their inception, being in the nature of wagering contracts on which account the Court will not lend its aid to their enforcement or protection. On this feature of the case another company has appeared and as *amicus curiae* filed an interesting and informative brief.

"However, we think that the point is concluded by the terms of Act No. 146 of the General Assembly of 1937, 40 Stat. 189. The Act plainly prohibits the future issuance of contingent endowment policies, and we think it equally applicable to the Unity policy designated 99-S which is a modified contingent endowment form, except to the extent of filling the divisions and classes already established, which by unmistakable implication legalized, if they needed it, such policies as had been issued before the enactment and provided for the continued issuance for the purpose of filling the divisions and classes theretofore created by existing companies, including Unity. This legislative enactment established our public policy upon the subject. *Wee's v. New York Life Insurance Co.*, 128 S. C. 223, 122 S. E. 586; *Alderman v. Alderman*, 178 S. C. 9, 181 S. E. 897."

Again, in *Powell v. Gary*, 200 S. C. 154, 20 S. E. (2d) 391, the Court said:

“The Company undertook to issue so-called ‘Contingent Endowment’ policies whereby the policyholders were promised that they would be placed in groups of twenty-five and when a policy matured by death of the holder, his beneficiary would be paid the face amount of the policy and the other policy in the group which was at that time the oldest would also be then matured and upon cancellation of it the insured would be paid the amount of insurance; and the premium rates were accordingly fixed at about double what they would have been for ordinary life insurance. *Unity v. Beasley* (Ga.), 13 S. E. (2d) 32.

“Validity of this unusual form of policy is treated in another decision filed simultaneously with this, that in the appeal of Gary as Executive Vice President in his proceeding against Atkinson and others in the case of *Morris, Plaintiff, against Unity Life Insurance Company and others, Defendants*, referred to hereinafter.”

The objection to this form of policy was raised before a three-Judge Federal Court in Oklahoma—*Liberty National Life Insurance Co. v. Reed*, 24 Fed. Supp., page 103—where it was duly considered and this form of insurance upheld by said Court.

It is not contended that this form of policy is not actuarially sound. The event whose happening matures the obligation is known and certain and is sure to happen. It is known that on an average a given number of members will die in each year. The amount the defendant Society must pay is known and certain, for when one dies two are paid, and the amount each is to receive is stated in the face of the contract. The Company makes no wager or gamble, for it promises to pay and does pay definite sums upon the happening of events certain to happen at times

definitely predictable in the aggregate. Every single underwriting principle of the universally accepted formula of ordinary life insurance governs and controls the calculation of premiums and the setting apart of reserves with which to provide for the payment of mortality endowments.

The petitioner, plaintiff, complains, however, that no insurable interest exists between the policyholders, and that the policyholders "do not belong to the class of beneficiaries of fraternal benefit insurance policies recognized and permitted by the statute law of the States of Alabama and South Carolina" (R. 144). The State of Alabama does not restrict the beneficiaries under certificates issued by fraternal benefit societies to any particular class of persons. On the contrary, Alabama Code 1940, Title 28, Section 173, copied in the appendix, provides in part that "Any beneficial member may direct any benefit be paid to such person or persons, entity or interest, as may be permitted by the laws of the Society?" When coupled with General Acts 1927, page 219, and Alabama Code 1940, Title 28, Section 3, there can be no sound argument made that the members of the division are not within the permitted class of beneficiaries under the laws of Alabama.

Further, the law is well settled in Alabama "that a person has an unlimited insurable interest in his own life, and that such person may take out a policy of insurance on his own life payable to whom he desires; that what is termed an 'insurable interest' is not necessary to the validity of such an issue procured by the assured."

National Life & Accident Ins. Co. v. Alexander, 226 Ala. 325, 327;

See, also, Metcalfe v. Montgomery, 229 Ala. 156, 160; Henderson v. First National Bank, 229 Ala. 658, 662.

To the same effect is the decision of the Third Circuit Court of Appeals in *Equitable Life Insurance Co. of Iowa v. Cumblings* (1925), 4 Fed. (2d) 794, 796.

See, also, *Burnett v. Wells*, 289 U. S. 670, 679, 77 L. ed. 1439, 1444.

In other words, in Alabama one person may legally insure his own life and make the insurance payable one-half to his estate and one-half to any other person, entity or interest. In effect that is what each of the members of defendant Society insured under the contingent mortality endowment plan actually does.

Even if the contracts did amount to wagering contracts, that fact would not sustain any claim of class action in the present case. The complaint does not state a claim either for relief to the plaintiff or as a class action within the jurisdiction of the District Court, and it was properly dismissed without prejudice.

Respectfully submitted,

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Of Counsel for Respondents.

I hereby certify that I have mailed, postage prepaid and properly addressed, a copy of the foregoing brief to Warren E. Miller, Esq., Washington, D. C., Attorney for the Petitioner.

Richard T. Rives,

Attorney for Respondents.

APPENDIX.

Alabama Statutes.—General Acts 1927, page 219; Code 1940, Title 28, Sections 3, 46, 58, 172, 173, 176, 177, 179, 180, 183, 184, 210, 220, 222, 223, 224, 225, 255, 258, 261, 266, 268; 269.

GENERAL ACTS 1927, PAGE 219.

AN ACT

To authorize the issuance of contingent endowment contracts of insurance by life insurance companies and fraternal benefit societies; and to provide for the maintenance of reserves thereon.

Be It Enacted by the Legislature of Alabama:

Section 1. That any life insurance company or fraternal benefit society transacting business in this State may issue contracts classifying the holders thereof into groups and providing for the payment of an endowment to the oldest member of each group contingent upon the mortality experience in such group.

Section 2. In order to pay such endowments as they severally mature, a reserve thereon shall be established and maintained upon a basis of not lower than the American Experience Table of Mortality with one year preliminary term and interest assumption of four per cent.

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved August 1, 1927.

CODE 1940, TITLE 28.

Sec. 3. **Policies, etc., which divide policyholders or members into classes, paying benefits to the oldest member of class.** No life insurance company, mutual aid association, or fraternal benefit society, order or association operating in this state shall hereafter be permitted to issue policies, certificates or contracts to policyholders or members providing for the establishment of its policyholders or members into divisions and classes for the purpose of providing for the payment of benefits from special funds created for such purpose to the oldest member of the division and class, or to the member of the division and class whose policy has been in force the longest period of time, upon the death of a member in such division and class, except as hereinafter provided. Any life insurance company, mutual aid association, or fraternal benefit society, order or association, heretofore operating on this plan in this state may continue so to do upon condition that such life insurance company, fraternal benefit society, or mutual aid association shall not hereafter establish its policyholders, or members, into divisions or classes other than the divisions or classes actually containing subsisting policies, or certificates, and provided that no life insurance company (including any organization of whatsoever character engaged in the writing of life insurance upon any plan) and no fraternal benefit society, order or association, and no mutual aid association, shall be permitted to operate on such endowment plan unless it have a paid in capital stock, if a stock company, of at least one hundred thousand dollars, or a surplus if a mutual company, or fraternal benefit society, order or association of at least twenty-five thousand dollars, which shall be increased to one hundred thousand dollars within six years. Any foreign life insurance company, mutual aid association, or fraternal benefit society, order or association, now doing business in this

state, or hereafter qualifying and becoming licensed in this state, shall be permitted to operate on this plan upon the same conditions. In order to pay such endowments as they severally mature as well as to pay all other benefits incorporated in any such policies, certificates, or contracts of insurance, any life insurance company, fraternal benefit society, or mutual aid association now operating upon this plan in this state shall establish and maintain on each such policy a reserve upon a basis not lower than the American experience table of mortality, modified preliminary term, Illinois standard, and interest assumption of three and one-half percent covering each contingency provided for in such policy.

Sec. 46. Powers, duties and jurisdiction of bureau of insurance and superintendent of insurance. The superintendent of insurance shall possess and have all the powers, and perform all the duties of supervision, regulation, and control of the business of insurance in this state. And the superintendent of insurance shall exercise the same control over the insurance companies or associations, mutual aid companies, fraternal societies, inter-insurance exchanges, their officers, agents and representatives; and shall collect from them all taxes, fees, and penalties as are required by law. The superintendent of insurance shall have the management and supervision of the bureau of insurance and shall be charged with the performance of all acts necessary to the carrying out and effectuating the purposes and ends for which said bureau was created. And the superintendent of insurance is hereby authorized and empowered, from and after the date of his appointment and qualification as such superintendent of insurance, to perform all duties now required by law, in relation to the supervision, regulation and control of the business of insurance in this state.

Sec. 58. When domestic company restrained and receiver appointed. If, upon examination, the superintendent of insurance is of opinion that any domestic insurance company is insolvent, or has exceeded its powers, or has failed to comply with any provision of the law, or that its condition is such as to render its further proceedings hazardous to the public, or to its policyholders, he shall apply to a court of competent jurisdiction through the attorney general of the state, to issue an injunction restraining it, in whole or in part, from further proceeding with its business. Such court may, in its discretion, issue the injunction forthwith, or upon notice and hearing thereof, and after a full hearing of the matter, may dissolve or modify such injunction, or make it perpetual, and may make all orders and decrees needful in the premises, and may appoint agents or receivers to take possession of the property and effects of the company, and to settle its affairs subject to such rules and orders as the court may, from time to time, prescribe, according to the course of proceedings in equity.

Sec. 172. Extended or paid-up protection granted. Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve necessary to enable it to do so, under a table of mortality not lower than the American experience table and four per cent interest, may grant to its members extended and paid-up protection or such withdrawal equities as its constitution and laws may provide; but such grant shall in no case exceed in value the portion of the reserve to the credit of such members to whom they are made.

Sec. 173. Members and beneficiaries. Any person may be admitted to beneficial, or general, or social membership in any society in such manner and upon such showing of eligibility as the laws of the society may provide, and any

beneficial member may direct any benefit to be paid to such person or persons, entity, or interest as may be permitted by the laws of the society; provided, that no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable in conformity with the provisions of the contract of membership, and the member shall have full right to change his beneficiary, or beneficiaries, in accordance with the laws, rules and regulations of the society.

Sec. 176. When such certificates may be issued. Such society shall not issue any such certificate until it shall have simultaneously put in force at least five hundred such certificates on each of which at least one assessment has been paid; nor where the number of lives represented by such certificates fall below five hundred. The net beneficiary assessment collected upon such certificate shall be based upon the standard industrial table of mortality, and interest at the rate of three and one-half per cent per annum, or upon a higher standard.

Sec. 177. Net beneficiary funds kept separate. The net beneficiary funds so collected shall be kept as separate and distinct funds and shall not be liable nor used for the payment of debts and obligations of the society other than the benefits herein authorized.

Sec. 179. Issue of certificates. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or if a voluntary association, the articles of association, the constitution and by-laws of the society, and the application for membership, and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member and copies of the same certified by the secretary of the society, or corre-

sponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to said charter or articles of incorporation, or articles of the association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiary and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership.

Sec. 180. Funds, investments, etc., of. Any society may create, maintain, invest, disburse, and apply an emergency, surplus, or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such fund shall be held, invested and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in section 172 of this title. The fund from which benefits shall be paid and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society and accretions of said fund; but no society, domestic or foreign, shall hereafter be incorporated, or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted when valued upon the basis of the national fraternal congress table of mortality as adopted by the national fraternal congress, August 23, 1899, or any higher standard with interest assumption, not more than 4 per cent per annum, or write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than 4 per cent per annum.

Sec. 183. Distribution of funds. Every provision of the laws of the society for the payment of members of such society in whatever form made, shall distinctly state the purpose of the same, and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes or the net accretions of either or any of said funds shall be used for expenses.

Sec. 184. Organization; method, etc., of. Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this article, may make and sign (giving addresses), and acknowledge before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public or to lead to confusion.

The purpose for which it is formed—which shall not include more liberal powers than are granted by this article; but any lawful social, intellectual, educational, charitable, benevolent, moral or religious advantages may be set forth among the purposes of the society—and the mode in which its corporate powers are to be exercised.

The names, residences and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year, or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Sec. 210. Disability benefits; funds for kept separate. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds, and the valuation of all other business of the society; but where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience and, in such case, a separation of the funds shall not be required.

Sec. 220. Surplus and reserves authorized. Nothing contained in this article shall prevent the maintenance of such surplus over and above the credits on the accumulation basis, and the reserves on the tabular basis as the society may provide by or pursuant to its by-laws; nor be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its by-laws; nor as making any such reserves or credits a liability in determining the legal solvency of the society.

Sec. 222. Examination of domestic society. The superintendent of insurance, and any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, and any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witnesses under oath and examine its officers, agents and employees or other persons in relation to the affairs, transactions and condition of the society. The expense of such examination shall be paid by the society examined, upon statement furnished by the superintendent of insurance, and the examination shall be made at least once in three years.

Sec. 223. Quo Warranto proceedings against society.

Whenever after examination the superintendent of insurance is satisfied that any domestic society has failed to comply with any provision of this article, or is exceeding its powers, or is not carrying out its contract in good faith, or is insolvent, or is transacting business fraudulently, or whenever any domestic society, after the existence of one year or more, shall have a membership of less than four hundred, or shall determine to discontinue business, the superintendent of insurance may submit to the attorney general a certified copy of such examination, with his recommendation thereon, and if in the opinion of the attorney general the facts and circumstances warrant, the attorney general shall thereupon commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, said society shall be enjoined from carrying on any further business and some person shall be appointed receiver of such society, and shall proceed at once to take possession of the books, papers, money and other assets of the society, and shall forthwith, under the direction of the court, proceed to close the affairs of the society and to distribute its funds to those entitled thereto. Neither the director of the department of commerce, superintendent of insurance, attorney general, or any other official or employee of the state, shall be in any way liable in damages, or to a suit or action for damages, by reason of having ordered, made, or participated in the making of any such examination, or by reason of any action recommended by him to be taken upon the basis of any such examination, or by reason of any official finding, opinion, judgment or recommendation upon or with respect to such examination, or by reason of the institution of any such action in quo warranto, or by reason of the performance of any official duty imposed upon him under the provisions of this article.

Sec. 224. Notice of quo warranto proceedings. No such proceedings shall be commenced by the attorney general against any such society until after notice has been duly served on the chief executive officers of the society and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceedings should not be commenced.

Sec. 225. Authority of attorney general and policyholders to institute proceedings. No action in quo warranto for the dissolution of any such domestic society shall be entertained by any court of competent jurisdiction, unless the same is made by the attorney general. Irrespective of the matter of dissolution of any such society, the right to institute proper proceedings in any court of competent jurisdiction for the appointment of a receiver for the protection and preservation of the trust fund of any such domestic society which is being depleted and dissipated fraudulently and wrongfully, to the irreparable injury of policyholders who have a property right interest in such fund, is vested also in the attorney general; but, in the absence of any action on the part of the attorney general, nothing in this section shall prohibit the institution of proper proceedings in a court of competent jurisdiction by any proper party.

Sec. 255. Mode of incorporation without capital stock. Fifteen or more persons may become a body corporate, without capital stock, for the purpose of doing the business of a mutual aid, benefit, and industrial company or association, as follows: Said persons shall make and file a certificate in the office of the judge of probate of the county in which its principal place of business is proposed to be located. The certificate shall show the following: The name of the proposed corporation. The location of the principal office in this state. That the object or purpose of the corporation is to do business as a mutual aid, benefit, and in-

dustrial company or association, with the powers and privileges prescribed by the laws of the State of Alabama. That the incorporators have entered into bona fide agreements, for insurance, of the kind authorized to be done by mutual aid, benefit, and industrial companies or associations, with not less than five hundred persons, and shall have received therefrom not less than twenty-five thousand dollars in cash. That said sum of money is in the possession of two of the incorporators, designated by the subscribers to receive such money. Any other matters providing for the conduct of the business of the proposed corporation not inconsistent with the laws of the State of Alabama. The names, residences, and postoffice addresses of seven persons, selected from among the incorporators as trustees for said corporation, for its first year.

Sec. 258. Board of trustees, number, election, powers and duties of. The board of trustees of such corporation shall consist of not less than seven nor more than nine persons, who must be members of the corporation. They shall be elected annually, to hold office until their successors are elected and qualified. Such board of trustees shall be the governing body of such corporation, and shall have the power to make all needful or proper rules, regulations, and by-laws for the conduct of the business of such corporation, not inconsistent with the laws governing mutual aid, benefit, and industrial companies or associations, or any other laws of the State of Alabama. Such board of trustees shall be elected at an annual meeting, to be held at the principal office or place of business of said corporation at a time to be fixed by the by-laws of the corporation, and at such meeting the members of such company or association may attend and vote on all matters before the meeting in person, or they may be represented by proxies, which must be in writing, and be executed at least thirty days prior to said meeting.

Sec. 261. Prerequisites to transaction of business. Every such company or association shall, before transacting any business in this state, submit to the superintendent of insurance copy of its charter, by-laws, contracts or policies, schedule of rates and other instruments governing its operation, together with its financial statement. If upon examination thereof, the superintendent of insurance finds that the schedule of rates is adequate to cover the risk under its contracts or policies, and finds that the charter, by-laws, contracts, certificates, policies and financial statement of such company or association meet all other requirements of this article and of any amendment subsequently made to it, he shall issue to such company or association a license to transact business as a mutual aid, benefit or industrial company or association. No such company or association shall be licensed, authorized or permitted to transact business in this state until the superintendent of insurance has approved its charter, by-laws, contracts, certificates, policies and financial set-up and finds that they comply fully with all the requirements of this article.

Sec. 266. Visitation and inspection of companies by superintendent of insurance. At least once every two years, and oftener whenever he deems it prudent to do so, the superintendent of insurance shall, personally or by his deputy, together with some competent person appointed for him for that purpose, visit each such domestic company or association, and examine its books and records as to its business affairs, especially as to its financial condition and ability to fulfill its obligations and as to its compliance with the law. He shall in like manner visit and examine, or cause to be visited and examined by some competent person or persons whom he may appoint for that purpose, any foreign company or association applying for admission or already authorized to do business in this state whenever he deems it prudent for the protection of con-

tract or policyholders in this state, or believes that any such company or association has violated any of the provisions of this article, or any of the laws of this state, relating to foreign corporations.

Sec. 268. Injunction may issue against companies. If, upon examination, the superintendent of insurance is of the opinion that any such domestic company or association is insolvent, or has exceeded its powers, or has failed to comply with any provisions of the law, or that its condition is such as to render its further proceedings hazardous to the public, or to its contract or policyholders, he may apply to a court of competent jurisdiction through the attorney general of the state to issue an injunction restraining it in whole or in part from further proceeding with its business. Such court may, in its discretion, issue the injunction forthwith, or may, upon notice and hearing thereof, and after a full hearing of the matter, dissolve or modify such injunction or make it perpetual, and may make all orders and decrees needful in the premises, and appoint agents or receivers to take possession of the property and effects of such company or association, and settle its affairs subject to such rules and orders as the court may from time to time prescribe according to the course of proceedings in equity.

Sec. 269. Revocation or suspension of licenses and certificates. If the superintendent of insurance is of the opinion, upon examination or other evidence, that any such foreign company or association, is in an unsound condition, that its actual funds, exclusive of its capital, if any, are less than its liabilities, or if it has failed to comply with the law, or if its officers or agents refuse to submit to examination or to perform any legal obligation in relation thereof, or if it fails to pay any final judgment against it in favor of a citizen of this state, he may revoke or suspend all licenses and certificates of authority granted to it.

or its agents, and shall cause notification thereof to be published in one or more newspapers of general circulation, and no new business shall thereafter be done by it or its agents in this state while such default or disability continues, nor until its authority to do business is restored by the superintendent of insurance; but if ground for revocation or suspension relates only to the financial condition or soundness of such company or association, or to deficiency in its assets, he shall notify such company or association not less than ten days before revoking its authority to do business in this state, and he shall specify in the notice the particulars of the alleged violation.